LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUL 19 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 290

STEWART OIL COMPANY, a Corporation; MICHIGAN OIL COMPANY, a Corporation; STEWART PRODUCERS, INC., a Corporation; KENNETH PATTERSON; G. F. STEWART; W. ROLLAND STEWART; FRANK J. TIERNAN and MORRIS YARBROVE,

Plaintiffs-Appellees,

vs.

SOHIO PETROLEUM COMPANY,

Defendant and Counter Claimant,

vs.

WALTER E. KLINE; STELLA P. KLINE; R. E. HAYES; W. T. FREDERKING and A. P. WAGEMANN,

Counter Defendants-Appellants,

and

CARL E. MOSES; DAVID R. STEWART and DONK BROS. COAL & COKE COMPANY,

Counter Defendants-Appellees.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

WILLIS P. RYAN,
HARLAN HELLER,
RYAN AND HELLER,
1709 Broadway,
Mattoon, Illinois,

L. C. COMBE,
311 W. Main Street,
Greenville, Illinois,

Attorneys for Counter Defendants Edward W. Kline and Ruth Lyoch, Administrators of the Estate of Walter E. Kline, deceased; R. E Hayes; W. T. Frederking and A. P. Wagemann.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	9
I.	
The Trial Court did not have jurisdiction of the parties and subject matter for three reasons:	
A. There was not the required diversity of citizenship	9
B. The suit is specifically and necessarily an attempt to adjudicate the title to real estate outside the jurisdiction of the Trial Court	16
C. The deposit with the Court by the interpleader does not place jurisdiction in the Court where it would otherwise lack jurisdiction. Jurisdiction determines deposit. Deposit does not determine jurisdiction	23
II.	
The decisions on the merits by the District Court and the Court of Appeals were contrary to all of the evidence and the law of Illinois and the weight of authority generally. Those decisions, appellants believe, make a travesty of justice in a court of equity	24
Conclusion	34

Appendix "A"—Opinion of the United States District Court for the Eastern District of Illinois on jurisdiction 1a

Appendix "B"—Opinion of the United States District Court for the Eastern District of Illinois on the merits 8a

Appendix "C"—Opinion of the United States Court of Appeals for the Seventh Circuit 21a

Appendix "D"—Judgment or decree of the United States Court of Appeals for the Seventh Circuit 27a

Appendix "E"—Constitutional Provisions and Statutes Involved 28a

Citations

Cases:

Bear v. Millikin Trust Co. (1929), 336 Ill. 366, 381, 168 N.E. 349 ..... 28, 29

Bevans v. Murray (1911), 251 Ill. 603, 96 N.E. 546 ..... 21, 22

Blackhurst v. James (1922), 304 Ill. 586, 593 19

Bundy v. Myers (1953), 372 Pa. 583, 94 A. 2d 724 29

Casey v. Adams (1880), 102 U.S. 66 16

Chicago, Wilmington & Franklin Coal Co. v. Minier (1942), 127 F. 2d 1006, 1009 30

Consolidated Companies, Inc. v. Martin (1941), 39 F. Supp. 567 16

Darst v. Lang (1937), 367 Ill. 119, 10 N.E. 2d 659, 661 30

Dazey v. Binkley (1918), 285 Ill. 513, 522, 121 N.E. 165 30

Dill v. Widman (1953), 413 Ill. 448, 109 N.E. 2d 765, 769 30
Dunham v. Kirkpatrick (1882), 101 Pa. 36, 47 Am. Rep. 696 28
Grubb v. Public Utilities Com. of Ohio (1930), 281 U.S. 470, 50 S. Ct. 374, 74 L. Ed. 972 16
Guth v. Texas Co. (1946), 155 F. 2d 563 15
Haughn v. Haughn (1921), 296 Ill. 305, 308, 129 N.E. 807 30
Haynes v. Felder (1957), 239 F. 2d 868 13
Hickok v. Gulf Oil Corp. (1959), 265 F. 2d 798 17
Indianapolis v. Chase National Bank (1941), 314 U.S. 63, 68, 86 L. Ed. 47, 62 S. Ct. 15 ..... 11, 12, 13, 14
Jividen v. New Pittsburg Oil Co. (1933), 45 Ohio App. 294, 187 N.E. 124 28
Kinder v. LaSalle County Coal Co. (1923), 310 Ill. 126, 132, 135, 141 N.E. 537 ..... 28, 29, 30, 33
Magnolia Petroleum Co. v. West (1940), 374 Ill. 516, 30 N.E. 2d 24, 26 ..... 28, 29
McCall v. Middleton (1922), 304 Ill. 408, 412, 136 N.E. 723 30
Miller v. Ridgley (1954), 2 Ill. 2d 223, 117 N.E. 2d 759, 760, 761, 763 28
Monon Coal Co. v. Riggs (1944), 56 N.E. 2d 672, 57 N.E. 2d 598 28
Mutual Life Ins. Co. v. Lott (1921), 275 F. 365, 372 23
Nance v. Donk (1958), 13 Ill. 2d 399, 151 N.E. 2d 97 ..... 28, 31
Parker v. Ormsby (1890), 141 U.S. 81, 83 9
People v. Flaherty (1947), 396 Ill. 304, 71 N.E. 2d 779 19
People's Bank v. Calhoun (1880), 102 U.S. 256, 26 L. Ed. 101 9

Potomac Milling & Ice Co. v. Baltimore & Ohio R.R. Co. (1914), 217 F. 665 18
Preston v. South Penn. Oil Co. (1913), 238 Pa. 301, 86 A. 203 29
Primos Chemical Co. v. Fulton Steel Corp. (1918), 254 F. 454 16
Reconstruction Finance Corp. v. Maley (1942), 125 F. 2d 131 16
Rhomberg v. Texas Co. (1942), 379 Ill. 430, 40 N.E. 2d 526, 529 ..... 28, 29
Robertson v. Sease (1878), 97 U.S. 646, 24 L. Ed. 1057 9
Robinson v. Seatex Oil Co. (1944), 57 F. Supp. 581 16
Silver v. Bush (1906), 213 Pa. 195, 62 A. 832 28
Smith v. Grubb (1949), 402 Ill. 451, 84 N.E. 2d 421, 425 29
Strawbridge v. Curtiss (1806), 3 Cranch 267, 2 L. Ed. 435 11
Susquehanna and Wyoming Valley R.R. and Coal Co. v. Blatchford (1871), 11 Wall 172, 20 L. Ed. 179 11
Texas Co. v. O'Meara (1941), 377 Ill. 144, 36 N.E. 2d 256 ..... 28, 29
Tremies v. Sunshine Mining Co. (1939), 308 U.S. 66, 80 S. Ct. 44, 84 L. Ed. 85 14
Tyler v. Stanolind Oil and Gas Co. (1935), 77 F. 2d 802 16
Webber Show Case & Fixture Co. v. Waugh (1930), 42 F. 2d 515 16

Constitution:

Constitution of the United States, Article III, Section 2 ..... 10, 14, 28a

Statutes:

United States Code Annotated, Title 28, Sections 1332, 1335, 1359, 1392, 1655 ..... 11, 12, 20, 28a, 29a
Illinois Revised Statutes, Chapter 110, Section 7 ..... 19, 20, 30a

Miscellaneous:

Chafee, The Federal Interpleader Act of 1936, 49 Yale L.J. 377, 395 14
Federal Jurisdiction and Procedure, Harry G. Fins (1960), Ch. II, pp. 6, 13 11
Hardin, Transfer of Mineral and Royalty Interest, Grant or Reservation of Coal and Other Minerals (1959), No. 2 U. of Ill. Law Forum 507, 518 28
Hermann, Reformation and Rescission (1960); No. 1 U. of Ill. Law Forum 1 30
3 Moore Sec. 22.09 14

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No.

STEWART OIL COMPANY, a Corporation; **MICHIGAN OIL COMPANY**, a Corporation; **STEWART PRODUCERS, INC.**, a Corporation; **KENNETH PATTERSON**; **G. F. STEWART**; **W. ROLLAND STEWART**; **FRANK J. TIERNAN** and **MORRIS YARBROVE**,

Plaintiffs-Appellees,

vs.

SOHIO PETROLEUM COMPANY,

Defendant and Counter Claimant,

vs.

WALTER E. KLINE; **STELLA P. KLINE**; **R. E. HAYES**; **W. T. FREDERKING** and **A. P. WAGEMANN**,

Counter Defendants-Appellants,

and

CARL E. MOSES; **DAVID R. STEWART** and **DONK BROS. COAL & COKE COMPANY**,

Counter Defendants-Appellees.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Petitioners, Edward W. Kline and Ruth Lynch, administrators of the Estate of Walter E. Kline, deceased; R. E. Hayes; W. T. Frederking and A. P. Wagemann, pray that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Seventh Circuit, entered on April 15, 1963.

OPINIONS BELOW.

The District Court wrote a memorandum opinion on a motion to dismiss. It is attached hereto as Appendix "A" infra p. 1a, and is reported in 185 F. Supp. 765.

The District Court's opinion on the merits is attached hereto as Appendix "B" infra p. 8a, and is reported in 202 F Supp. 952.

The opinion of the Court of Appeals is attached hereto as Appendix "C" infra p. 21a.

The judgment or decree of the Court of Appeals is attached hereto as Appendix "D" infra p. 27a.

JURISDICTION.

The decree or judgment of the Court of Appeals was entered April 15, 1963 (Appendix "D" infra p. 28a.) The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254 (1) and Rule 38, Sec. 5(b) of the Supreme Court.

QUESTIONS PRESENTED.

1. Did the trial court have jurisdiction of the parties and subject matter in accordance with the Constitution of the United States and the statutes of the United States and the State of Illinois, as construed by the courts?

2. Were the lower courts in error in holding that oil and gas were conveyed by the 1907 "Warranty Deed to Coal and Mining Rights?" Was that error in view of (1) all of the

wording in the conveyance, (2) the interlineation of the words "at coal depth" by typewriter in the printed form, (3) all of the evidence, and (4) the uncontroverted evidence, oral and documentary, that the parties did not intend the printed words "other mineral" of the form to include oil and gas, nor any surface rights, nor any rights whatever below coal depth of 125 to 380 feet below the surface, but only coal and other solid minerals necessarily mined with coal at such coal depth, access being gained underground from other lands?

3. In the alternative, were the lower courts in error in not reforming that "Warranty Deed to Coal and Mining Rights" to clearly show that intention and limitation?

4. Shall the court adjudicate the realestate title as between the divergent groups of claimants so as to decide which of the two opposing sides of the controversy is entitled to the accumulated and future proceeds from oil recovered and to be recovered from the land?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

	Appendix "E" herein
Constitution of the United States, Art. III, Sec. 2	28a
28 U.S.C.A., Sec. 1332	28a
28 U.S.C.A., Sec. 1335	28a
28 U.S.C.A., Sec. 1359	29a
28 U.S.C.A., Sec. 1392	29a
28 U.S.C.A., Sec. 1655	29a
Illinois Revised Statutes, Ch. 110, Sec. 7	30a

STATEMENT OF CASE.

Plaintiffs, citizens of the State of Michigan, filed suit against Sohio Petroleum Company, an Ohio Corporation authorized to do business in the State of Illinois. The suit was filed in the District Court of the United States for the Eastern District of Illinois. The suit demanded proceeds from the sale of oil produced from lands in Bond County, Illinois.

Sohio Petroleum Company filed an answer to the complaint and a counterclaim of inter-pleader. The counterclaim was later amended, and the oil company admitted the purchase of the oil from the premises and stated that adverse claims had been filed to the proceeds, and stated that in order to determine the rights to the proceeds it would be necessary to add additional parties. The amended counterclaim asked that Sohio not be compelled to become involved in the dispute and that certain parties be added to the suit, and that the Court determine the parties entitled to the money withheld by Sohio and also money that would be accumulated in the future by reason of the purchase of oil from said property.

The parties added were Donk Bros. Coal and Coke Company, an Illinois Corporation, Carl E. Moses and David R. Stewart, citizens of Illinois, and these parties were referred to in the trial court and briefs as Donk, et al.; Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann, all citizens of Illinois, referred to in the trial court and in the briefs as Kline, et al. In addition, John J. Steiner and Josephine M. Steiner, citizens of Illinois, were made parties, but did not appear and were defaulted.

The dispute between plaintiffs and Donk Bros., et al., aligned on one side, and Kline, et al., aligned on the other side, arose out of a deed to said premises.

The original defendant, Sohio Petroleum Company, was discharged pursuant to an interlocutory decree.

Plaintiffs produced oil from the Southeast Quarter of the Southeast Quarter of Section 29, Township 6 North, Range 4 West of the Third Principal Meridian, Bond County, Illinois, pursuant to an oil and gas lease dated October 21, 1955, from Donk Bros. Coal and Coke Company, lessor, to Carl E. Moses and David R. Stewart, lessees, and assigned to plaintiffs, subject, only, to overriding royalty interests, aggregating a 3/32nds of 7/8ths of the oil and gas so produced and marketed, reserved unto the lessees.

Donk Bros. Coal and Coke Company acquired its ownership in the premises by quit-claim conveyance from Theodore Rassieur, agent and attorney for Donk Bros., who had been vested with title by the Warranty Deed to Coal and Mining Rights dated September 21, 1907, from Samuel J. Brown (unmarried), as Grantor, to Theodore Rassieur, as Grantee, conveying:

> "all coal and other mineral under the surface of said land' together with the right to mine and remove said coal and other mineral and the right to conduct mining operations under the surface of said tract of land therefor, and the right to use all rooms, entries and mining ways (at coal depth), under the surface of said tracts of land as and for mining-ways to and from beds of coal or other mineral in other lands." (The words "at coal depth" are interlined by typewriter in the original instrument.)

Walter E. Kline, Stella P. Kline and R. E. Hayes and their oil and gas lessees, W. T. Frederking and A. P. Wagemann, claim ownership of the oil and gas from said premises, including the funds placed on deposit by Sohio, by mesne conveyances from one Albert T. Brown, being the Grantee of a Warranty Deed from the same Samuel J. Brown, as Grantor, dated, also, on September 21, 1907, covering the forty acre

tract, with other lands, but specifically providing: "(coal, etc. underlying said premises reserved, same having been heretofore sold)".

The pleadings filed by Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann, referred to as Kline, et al., alleged that the oil and gas rights were not conveyed by the above described "coal and other mineral deed" from Samuel J. Brown to Theodore Rassieur, but were conveyed by the deed from Samuel J. Brown to Albert T. Brown, and claimed, (a) That the "coal and other mineral deed" conveyed no oil and gas as a matter of law, and (b) That if the legal effect of the deed is otherwise then the inclusion of oil and gas is the result "of either the mutual mistake of the grantor, grantee and grantee's attorney who prepared the deed, or the mistake of grantor or the fraud of the grantee and or his successors" and, therefore, should be accordingly corrected by reformation.

The plaintiffs contended, (a) The "coal and other mineral deed" from Samuel J. Brown to Theodore Rassieur did include and convey the oil and gas as a matter of law; and (b) The alleged right of deed reformation (so as to exclude the oil and gas) is not available as against the intervening rights of third parties including the plaintiffs.

Carl E. Moses and David R. Stewart contended, (a) The "coal and other mineral deed", from Samuel J. Brown to Theodore Rassieur did include and convey the oil and gas as a matter of law; and (b) That the said deed is not in any event subject to the alleged right of reformation as to them.

The position of Donk Bros. Coal and Coke Company was identical with that of the plaintiffs, except that they are not third parties insofar as the question of reformation is concerned, and they contended that the facts did not warrant the reformation of the deed as requested.

The contentions of the plaintiffs, citizens of Michigan, and the counterdefendants, Carl E. Moses, David R. Stewart and Donk Bros. Coal and Coke Company, citizens of Illinois, were identical, except that Donk Bros. Coal and Coke Company could not claim to be innocent third parties. On the other side were Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann, all citizens of Illinois.

In order to judge the case, the trial court had to determine title to the property in Bond County, Illinois. Bond County, Illinois, is not within the territorial limits of the United States District Court for the Eastern District of Illinois, but is in the territorial limits of the United States District Court for the Southern District of Illinois.

In the trial court, Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann contended that the court did not have jurisdiction for the reason that the court could not adjudicate title to real estate outside the territorial limits of the court, and for the further reason that the alignment of the parties demonstrated a dispute between citizens of Michigan and Illinois on one side and citizens of Illinois on the other side.

The trial was held March 21st, 22nd and 23rd, 1960, and the plaintiffs and the counterdefendants Moses and Stewart, and counterdefendant Donk Bros. Coal and Coke Company, proceeded on the theory that the warranty deed to coal and mining rights conveyed oil and gas as a matter of law and was not subject to construction or reformation. They rested their cases after introducing in evidence various exhibits including deeds, oil and gas leases and assignments thereof.

Walter E. Kline, Stella P. Kline, R. E. Hayes, W. T. Frederking and A. P. Wagemann offered a number of witnesses and exhibits designed to show the circumstances surrounding the transaction and the intention of the parties.

The trial court held that the United States District Court for the Eastern District of Illinois had jurisdiction to adjudicate the property rights to land lying outside of the district, and that the action in question was in personam and therefore transitory. The trial court further held, with reference to the merits, that the established law of Illinois was that "coal and other mineral" does convey oil and gas as a matter of law. The deed in question was dated September 21st, 1907.

The United States Court of Appeals for the Seventh Circuit affirmed the trial court.

A more detailed statement of the case appears in the Kline, et al. Court of Appeals appendix and briefs filed with the record in the Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT DID NOT HAVE JURISDICTION OF THE PARTIES AND SUBJECT MATTER FOR THREE REASONS. A. THERE WAS NOT THE REQUIRED DIVERSITY OF CITIZENSHIP. B. THE SUIT IS SPECIFICALLY AND NECESSARILY AN ATTEMPT TO ADJUDICATE THE TITLE TO REAL ESTATE OUTSIDE THE JURISDICTION OF THE TRIAL COURT. C. THE DEPOSIT WITH THE COURT BY THE INTERPLEADER DOES NOT PLACE JURISDICTION IN THE COURT, WHERE IT WOULD OTHERWISE LACK JURISDICTION. JURISDICTION DETERMINES DEPOSIT, DEPOSIT DOES NOT DETERMINE JURISDICTION

United States courts have no jurisdiction except that which is conferred upon them by the constitution and laws of the United States. The presumption persists throughout the case that the court is without jurisdiction unless the contrary affirmatively appears. The jurisdiction must arise from the law and not merely by consent of the parties. *People's Bank v. Calhoun* (1880), 102 U.S. 256, 26 L. Ed. 101; *Robertson v. Sears* (1878), 97 U.S. 646, 24 L. Ed. 1057; *Parker v. Overman* (1890), 141 U.S. 81, 83.

A. THERE WAS NOT THE REQUIRED DIVERSITY OF CITIZENSHIP.

There are only two sides to the controversy. On one side are those who claim through the coal company grantee of a "Warranty Deed to Coal and Mining Rights" from a 1905 farm owner. On the other side are those who claim through an oil and gas lease from a 1956 owner of the remainder in the land. There is no dispute among those on each side of the controversy, regardless of how they are designated in the plead-

ings. They worked together throughout the acquiring of the interests in the property, the pleadings, the trial and the appeal.

Originally a part only of the closely related parties on the coal company side of the controversy, and who were Michigan citizens, sued in the Eastern District of Illinois the oil company of Ohio which had purchased oil from the premises. They alleged the Bond County land (in the Southern District of Illinois).

The oil company examined the title. It discovered the omitted parties and the disputed title to the real estate. The oil company filed an interpleader alleging the omitted parties and the title dispute, and deposited the proceeds up to a certain date with the court. It alleged the condition of the title, the fact that the land was in Bond County in the Southern District of Illinois, the names and citizenship of the claimants from Illinois and from Michigan on the coal company side of the controversy, and the names and citizenship of the claimants from Illinois on the other side of the controversy. It requested the court to adjudicate the title to the real estate, and alleged that it had no interest in the controversy, and asked to be dismissed with its costs and attorney fee. The trial court accordingly dismissed the interpleading oil company from the case and allowed its costs and attorney fee.

This suit is not within the jurisdiction of the Court for the reason that it does not involve a controversy between citizens of different states as provided by the Constitution of the United States, Art. III, §2, and the judicial construction of that section.

Furthermore, it is not within the jurisdiction of the Court for the reason that it does not involve "two or more adverse claimants of diverse citizenship as defined by Section 1332" of

the Judiciary Act. Title 28 U.S.C.A., par. 1335, referring to par. 1332.

Prior to the complete revision of the Judiciary Act in 1948, there were differing opinions regarding complete diversity and the relevance of the citizenship of the interpleader. Some based this definition of diverse citizenship on the Judiciary Act and others on the Interpleader Act. By the revision both were brought together. Now there must be "diverse citizenship as defined by section 1332" of the Judiciary Act.

Harry G. Fins, in his recent edition of Federal Jurisdiction and Procedure, published in 1960, discusses this point. Chapter II on page 6 is entitled Jurisdiction in Civil Cases. On the same page under the subhead A., Diversity of Citizenship, appears the following:

> "(1) Complete diversity is required. Therefore, when there are two or more plaintiffs or defendants, all of the parties on one side of the litigation must be citizens of a state different from any of the parties on the other side. • • • If A, a citizen of Illinois, and B, a citizen of Ohio, sue C, a citizen of New York, D, a citizen of California, and E, a citizen of Illinois, diversity is destroyed because there are Illinois citizens on both sides of the litigation.
>
> (2) • • • The intervention or subsequent joinder of one who is an indispensable party ousts the jurisdiction of the court if diversity of citizenship is thereby destroyed."
>
> *Strawbridge* v. *Curtiss* (1806), 3 Cranch 267, 2 L. Ed. 435; *Susquehanna and Wyoming Valley Railroad and Coal Company v. Blatchford* (1871), 11 Wall 172, 20 L. Ed. 179; *Indianapolis* v. *Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47, 62 S. Ct. 15.

In the same chapter on page 13, Mr. Fins states as follows:

> "The court will scrutinize the case to determine whether there really is diversity of citizenship, and in order to do so will disregard the position in which the plaintiff has

placed the parties. And if it determines that a party who should have been a plaintiff was placed as a defendant, or vice versa, the court will realign the parties, and if after such realignment there is no diversity of citizenship, the cause will be dismissed for want of jurisdiction. This is known as the doctrine of realignment. (Citing *Indianapolis* v. *Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47, 62 S. Ct. 15)."

The Judiciary Act now has codified a number of these points; 28 USCA, paragraph 1359, provides:

> "A District Court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

The Judiciary Act, Title 28, USCA, Paragraph 1335, provides as follows:

> "Paragraph 1335(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation * * * having in his or its custody or possession money or property of the value of $500.00 or more * * * if (1) Two or more adverse claimants, of diverse citizenship as defined by section 1332 of this title * * * are claiming or may claim to be entitled to such money * * *; and if (2) the plaintiff has deposited such money or property * * * into the registry of the court * * *"

It will thus be seen that the claimants must be of diverse citizenship, and that the citizenship of the interpleader is immaterial to jurisdiction.

Such realignment reveals that parties from Illinois are on both sides of the controversy. When that is true, this Court has no jurisdiction. All of the claimants on one side of the controversy must be diverse from all claimants on the other side of the controversy. The Michigan and Illinois claimants on the coal company side of the controversy, in the

words of Justice Frankfurter, "are colloquially speaking, partners in litigation." *Indianapolis v. Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47, 62 S. Ct. 15. There being Illinois citizens on both sides of the controversy, jurisdiction is defeated. The interpleader is not a "claimant" in any sense of the word, and has no interest, other than as stakeholder, in the controversy.

The Court of Appeals, in order to sustain jurisdiction, believes "that Sohio's interest was more than that of a mere stakeholder." This is in spite of the Donk, et al. insistence on page 33 of their brief that Sohio was "but a stakeholder." The Court of Appeals recites a number of reasons for that belief. All are common to interpleading stakeholders, viz. "protection from multiple suits," "potential liability as a tort feasor," and "validity of its purchase agreements with one of the groups of adverse claimants."

The Court then states, "Necessarily, it was interested vitally in the identity of future recipients of royalties and in the ownership of the oil. This *interest* of Sohio is sufficient to give it standing * * *" (emphasis by Court). The important point is that there must be diversity between "claimants." Sohio is in no sense a "claimant" of the land or any of the proceeds from the sale of oil. Its only interest is to dispose of all of the proceeds to claimants designated by the court, and for that purpose to have the court adjudicate the title to the real estate.

The Court of Appeals in its opinion cites *Haynes v. Felder*, 239 F. 2d 868, 5th Cir. 1957, as authority for the holding that "it is sufficient if two adverse claimants with genuinely adverse interests are citizens of different states"—even though more than one may be from the same state. That citation stands practically alone, and is directly contrary to the Supreme Court of the United States and the great weight of authority.

Indianapolis v. *Chase National Bank* (1941), 314 U.S. 63, 86 L. Ed. 47; *Treinies* v. *Sunshine Mining Co.* (1939), 308 U.S. 66, 80 S. Ct. 44, 84 L. Ed. 85; Federal Jurisdiction and Procedure, Harry G. Fins (1960), Ch. II, pp. 6, 13. It follows some of the arguments used prior to the 1948 revision of the Judiciary Act, by which revision the Judiciary Act and the Interpleader Act were brought together. *Haynes* v. *Felder* leans heavily on pre-1948 Act articles and texts. Chafee, The Federal Interpleader Act of 1936, 49 Yale L. J. 377, 395 and 3 Moore 22.09. In the first part of the citation (p. 870) it correctly states that "it is clear that such a proceeding could not be brought as a diversity action under 28 U.S.C.A. (1332 * * * it has consistently been held that the law requires that each party have such citizenship that he could sue in diversity every other actual or indispensable party properly aligned against him. *City of Indianapolis* v. *Chase National Bank*, 314 U.S. 63, 62 S. Ct. 15, 86 L. Ed. 47, and this requirement has been held applicable to non-statutory interpleader."

Then in the latter part of the citation the Court appears to have determined to take a liberal attitude in order to retain jurisdiction. It seems to say that the statutes do not allow jurisdiction but somehow the Constitution, Art. III, §2, should. It argues for "partial diversity," "permissible incomplete diversity," "minimal diversity" and "this rationale," and makes the following utterly chaotic jurisdictional conclusion (p. 870):

> "Granted that the cases and text writers have rejected as inapplicable to statutory interpleader suits the 'complete diversity' rule, it still must be agreed, we think, that it is not easy to determine precisely how 'incomplete' a diversity among claimants has actually been sanctioned by the cases. This problem arises from the fact that though the courts and the text writers have stated that complete diversity would not be required they have not specifically catalogued and dealt with each of the several possible forms of incomplete diversity."

Again citing "Professor Chafee" the Court says, "jurisdictional requirements should be liberally interpreted to permit the federal courts to handle as many as possible of the cases that state courts may be unable to adjudicate completely." That is directly contrary to the fundamental law that federal courts are of strictly limited jurisdiction. Otherwise they would be overrun with litigation. Furthermore, the record in the present case shows conclusively that there is no possible reason why the state court of the situs of the land, the title of which is being adjudicated, would not be as able as the federal court of the Eastern District of Illinois to "adjudicate completely" the controversy. The forum was a matter of choice and not necessity. All parties were readily amenable to a court of the situs of the land.

The Court of Appeals also cites *Guth* v. *Texas Co.*, 155 F. 2d 563, 566 (7th Cir.) 1946, which was not an interpleader action, and reasons that the several holders of shares in the Donk, et al. lease could sue separately for their shares of the royalty payments, and that that somehow makes complete diversity unnecessary.

A reading of that citation clearly shows that it is not relevant to the present case. It is neither an interpleader nor one involving diversity. The complaint in that case, after repeated amendments, "stated one cause for relief for negligence and one on account" for oil and gas that were burned and wasted. The appeals court "agreed with the District Court that the cause of action asserted for negligence by the plaintiff was joint with other covenants and could not be maintained by the plaintiff alone." But it did not "think the District Court should have ignored the allegations * * * on account for gas, gasoline * * * (and that it) was a several obligation and the plaintiff could sue separately for his proportion of the royalty." Kline, et al. urge that it is immaterial whether or not

the various holders of royalty interests in the Donk, et al. lease could sue separately. The important question is on which side of the controversy are they? When Illinois citizens are on both sides of the controversy, jurisdiction is defeated.

B. THE SUIT IS SPECIFICALLY AND NECESSARILY AN ATTEMPT TO ADJUDICATE THE TITLE TO REAL ESTATE OUTSIDE THE JURISDICTION OF THE TRIAL COURT.

The distinction between local and transitory actions is as old as actions themselves. No one has ever supposed that laws which prescribe generally where one should be sued included such suits as are local in their character, either by statute or by common law, unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. *Casey v. Adams* (1880), 102 U.S. 66.

A leasehold interest to minerals in place is a title to realty, and suits involving the title to real estate must be tried in the district in which the land is located. The jurisdiction of the district court is coextensive with the boundaries of the judicial district and extends no further, save as congress has expressly extended it. An action to quiet title, to remedy or remove a cloud on the title, is local in character. It must be filed in the district where the land is situated. *Robinson v. Seater Oil Co.* (1944), 57 F. Supp. 581; *Tuler v. Stanolind Oil and Gas Co.* (1935), 77 F. 2d 802; *Primos Chemical Co. v. Fulton Steel Corp.* (1918), 254 F. 454; *Reconstruction Finance Corp. v. Maley* (1942), 125 F. 2d 131; *Webber Show Case and Fixture Co. v. Waugh* (1930), 42 F. 2d 515. The jurisdiction of the subject matter must arise from the law, and not merely by the consent of the parties. *Grubb v. Public Utilities Commission of Ohio* (1930), 281 U.S. 470, 50 S. Ct. 374, 74 L. Ed. 972; *Consolidated Companies, Inc. v. Martin* (1941), 39 F. Supp. 567.

The District Court's memorandum on jurisdiction cites *Hickok v. Gulf Oil Corp.* (1959), 265 F. 2d 798, as holding that the court's jurisdiction is not affected by the circumstance that the funds in the registry possess the legal character of proceeds derived from the sale of interests in realty, or by the fact that title to those funds is to be determined in accordance with the state law.

A reading of the case shows that it is not in point. An Ohio resident died in Ohio. His estate was pending there. He owned property in Ohio and an oil interest in Texas. There was domiciliary probate in Ohio. Also pending in a Texas court was a suit "seeking determination of rights in, and accounting as to, the properties comprising the Hickok Estate in Texas * * * The precise question at bar is whether the (Ohio) Federal Court has abused discretion in deferring adjudication of the right of the interpleading claimants to the fund pending final determination of the action in Texas." The Texas law also says that the "royalty involved here is real property, and interest in the mineral in place prior to extraction from the land * * * and it has long been settled that the law of the state in which the property is situated governs the devise of an interest therein." The Ohio court having jurisdiction for other reasons, dissolved the restraining order and stayed proceedings "until final determination of the cause in Texas."

At page 802 the Court held:

> "The district judge did not abuse his discretion in dissolving the temporary injunction * * * thus they were free to litigate their respective claims to the various Texas properties and the accounting problems between themselves as well. It may fairly be expected that the parties will return to the prosecution of their claims in the interpleader suit (in Ohio) not only with an adjudication of their respective interests, but also with some up-to-date settlement of accounts as between them."

It is apparent that the Ohio Court refused to adjudicate the title to the part of the property in Texas, and refused to dispose of the fund.

Potomac Milling and Ice Co. v. Baltimore and Ohio R.R. Co. (1914), 217 F. 665, involved a claim for fire damage to real estate caused by sparks from the railroad. The suit was filed in the Federal court of Maryland. The defendant pleaded that the land in question is in West Virginia and that, therefore, the Court had no jurisdiction. It contended that a suit for injury to real property is purely a local action and cannot be maintained outside the situs of the real estate. That contention was upheld. The Court held:

> "The unerring test by which it may be determined whether a particular cause of action sounding in damages is local or transitory is that if the subject of the injury be real estate or an easement * * * obviously the action must be local, for the reason that injury to that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated. But if the subject of the injury be an individual, then an injury to that individual's person, no matter by what means occasioned or where afflicted, it is essentially an injury to a subject not having a fixed * * * immovable location. In the courts of Maryland a suit for damages to real estate caused by fire negligently communicated to improvements thereon is local. (Quoting Chief Justice Marshall of the United States Supreme Court:) 'Actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local when their cause is in its nature necessarily local. It would require a hardihood which I do not possess to pass this limit.'"

In the present case, the transaction took place on the Bond County land, in the Southern District of Illinois. From that land the plaintiffs "have been and are now producing and marketing oil * * *" according to the original complaint

(App. 16). Sohio in its answer (App. 18) "admits that it has purchased oil from the property involved * * *" In Sohio's counterclaim for interpleader (App. 19) it states that "it has purchased oil from the property referred to in paragraph 2 of the complaint, described as the SE¼ SE¼, Section 29, T6N; R4W, Bond County, Illinois * * *".

The District Court also cited *Blackhurst v. James*, (1922), 304 Ill. 586, 593, but failed to refer to the essential difference between that case and the present one. In that case it was contended that "because the lands described in the deeds were in McDonough and Henderson Counties (as well as Hancock County), the Circuit Court of Hancock County had no jurisdiction of the subject matter. Section 3 of the Chancery Act provides that suits in chancery which may affect real estate shall be brought in the county where the same or some part thereof is situated." Of course the court held it had jurisdiction. A part of the land was in the county where the court sat, as required by the statute then and now.

The District Court cites Chapter 110, Illinois Revised Statutes, Section 7. That Court makes a point of the word "venue" in the heading, and contends that makes the question one of venue and not jurisdiction. It contends that any objection to venue was waived by the parties. The heading was supplied by the compiler of the statute and is not a part of the title or contents of the Act. *People v. Flaherty* (1947), 396 Ill. 304, 71 N.E. 2d 779.

The relevant portions of the statute read as follows:

> "7. Venue—Public Corporations—Local Actions—Libel—Insurance Companies. §7(1) * * *
>
> (2) Any action to quiet title to real estate, or to partition or recover possession thereof, or to foreclose a mortgage or other lien thereon, must be brought

in the county in which the real estate or some part of it is situated."

It seems apparent from the plain wording that this section is far more than a venue matter, and that it cannot be waived by mere consent of the parties or failure to raise the question. The Act places all three remedies in the same statute. The principles applicable to one apply to all three. No one could contend that as to partition and foreclosure the Act is a venue matter subject to waiver and consent of the parties. If the Act is jurisdictional as to partition and foreclosure, it is necessarily so as to actions to quiet title; if it is "must" as to partition and foreclosure, it is "must" as to actions to quiet title. It is important to note that the word "must" prior to amendment read "shall." If one assumes that it is a venue matter and subject to waiver, could it be reasoned that by consent of the parties a Cook County, Illinois court could partition land solely in Bond County, or that an Illinois district court for the Eastern District of Illinois could quiet title of, partition, or foreclose a mortgage on, property solely in the State of California, or even in the Southern District of Illinois?

Similarly, could it be that by consent of the parties this Court could quiet title to real estate solely in any one of the other 49 states, or real estate solely in the City of Chicago in Cook County in the Northern District, or as in this case, solely in Bond County in the Southern District? No doubt there are cases of improper venue which can be waived by the parties, but the quieting of title must be a jurisdictional matter. In both the federal and state courts, local actions involving titles to real estate must be brought in the district or county in which at lea. a part of the property is located. 28 U.S.C.A. 1392, 1655; Ill. Rev. Stat., Ch. 110, Sec. 7. Any other decision would be chaotic.

If every county in every state and every federal district court in every district could adjudicate titles to real estate solely in other counties or districts in the United States, no title would be secure. If the contention is proper that where the Court has jurisdiction of the parties it may act in personum and compel the parties to execute the necessary instruments, then, any case involving a title to real estate, wherever located, could be decided by the Court having jurisdiction of the parties. Could it be successfully reasoned that a district court could effect the foreclosure of a mortgage by deciding that the mortgagor could not pay the mortgage and order him to convey the property to the mortgagee? Could a district court similarly effect a partition of real estate aaywhere in the country, or even in another district in Illinois, by compelling the parties to execute the necessary deeds? Similarly, in an action to quiet title, or remove a cloud or construe or reform a deed, could the court decide the case, as in this instance, by merely deciding who owned the property, and who is entitled to the oil proceeds, regardless of where the land is located? If that were the law, what title security would a subsequent owner have if he would be required to check the actions of all the courts in the country to see how they had construed the title to his property?

The District Court in its opinion also cited *Bevan v. Murray* (1911), 251 Ill. 603, 96 N.E. 546. That case concerned the estate of a Cook County, Illinois, resident. She died owning a number of properties in Cook County and some in Indiana. Her husband, the executor, executed certain deeds of this property to his son-in-law. It was contended that he exceeded his authority. The suit was a bill in equity to set aside certain deeds to the property, including that in Indiana. The trial court ordered

re-conveyance of the Indiana property. The Supreme Court in a four-to-three decision upheld that part of the decree. The decision is based on the ruling in a very early United States Supreme Court case that "when the defendant is liable, either in consequence of a contract or as trustee or as holder of a legal title acquired by a species of mala fides practiced on the plaintiff" the court may act on the person. The court then negatives the value of its decision by saying that "the interpretation, as well as the force and effect to be given the will of Mary M. Champlin, as well as all other transactions affecting the title of the Indiana real estate, may ultimately become a question to be determined by the courts of that state." The three-judge dissenting opinion strongly disagrees with the majority holding.

The trial court in its opinion citing the above case of *Bevans* v. *Murray* (1911), 251 Ill. 603, 96 N.E. 546, states the question there was "somewhat akin to the question here presented." Kline, et al. believe that case is not in point with the present action. The key to the upholding of jurisdiction in the *Bevans* case was that "when the defendant is liable, either in consequence of a contract or as trustee or as a holder of legal title acquired by a species of mala fides practiced on the plaintiff," the court may act on the person of the defendant. It might be that a person who contracts to give a deed may be followed to another jurisdiction and compelled to execute the deed called for by the contract. Similarly, it might be that a dishonest trustee who absconds, or a person who, after a species of mala fides leaves the jurisdiction, may be pursued. Such situations are far removed from the present action seeking to quiet the title to, or remove a cloud on, the Kline land, or construe the various deeds, leases and

assignments, or reform, if necessary, the Samuel Brown Warranty Deed to Coal and Mining Rights. Surely the gate is not thrown wide for the Court to effect the construction of an ambiguous deed, or the reformation of a mistakenly written deed, merely by acting on the person of the parties and ordering them to execute certain deeds, releases, etc. Of what effect in the foreign jurisdiction is the trial court's judgment or decree in this case construing the title in favor of Bonk, et al. Kling, et al. believe it is of no effect.

C. THE DEPOSIT WITH THE COURT BY THE INTERPLEADER DOES NOT PLACE JURISDICTION IN THE COURT WHERE IT WOULD OTHERWISE LACK JURISDICTION. JURISDICTION DETERMINES DEPOSIT. DEPOSIT DOES NOT DETERMINE JURISDICTION

The District Court in its opinion also says, "It cannot be disputed that this Court has jurisdiction over the proceeds of the funds deposited in this Court." This clearly is in error. It is obvious that Sohio deposited the funds with the Court. But that does not give it jurisdiction.

> "In an interpleader action jurisdiction determines deposit, not deposit jurisdiction. It would be more than mere novelty to hold that, the Court otherwise lacking jurisdiction, the interpleader would confer jurisdiction on the Court to determine his true obligation, in the face of antagonistic claims, merely by depositing the amount of its admitted liability with the Court. Under that theory the interpleader could confer jurisdiction on any court by depositing the fund in that court, and in such event the statute would be entirely useless and unnecessary. The truth is that unless the Court regards ample jurisdiction in the premises, there is no fund in the sense in which that word is used." *Mutual Life Ins. Co. v. Lott* (1921, D.C.) 275 F. 365, 372.

It also must be borne in mind that if the trial court in the present action is correct in holding that the action is transitory and not local, then jurisdiction must be based on some other ground. Since (1) the land is not within the jurisdiction of the Court, and (2) the Court does not have jurisdiction of the parties due to lack of diversity of citizenship, and (3) the deposit of the funds does not confer jurisdiction, then the Court has no jurisdiction to decide any transitory question.

II.

THE DECISIONS ON THE MERITS BY THE DISTRICT COURT AND THE COURT OF APPEALS WERE CONTRARY TO ALL OF THE EVIDENCE AND THE LAW OF ILLINOIS AND THE WEIGHT OF AUTHORITY GENERALLY. THOSE DECISIONS, APPELLANTS BELIEVE, MAKE A TRAVESTY OF JUSTICE IN A COURT OF EQUITY.

The "Warranty Deed to Coal and Mining Rights," except for the words "and other mineral" in the printed form, is plainly a conveyance only of coal. It is entitled in large block lettering, "Warranty Deed to Coal and Mining Rights." It specifically limits the conveyance to "under the surface," "together with the right to conduct mining operations under the surface." It refers to "rooms, entries and mining ways at coal depth under the surface * * * as and for mining ways, to and from beds of coal or other mineral in other lands." (N.B. Not mining ways, to and from beds of coal in other lands, but to and from beds of coal or other mineral in other lands.)

The words "at coal depth" were interlined by typewriter in the printed form. There must have been at the time an obvious and reasonable purpose in the minds of the parties. It is noted that in many other deeds using the same

printed form, to the same grantee, prepared by the same coal company attorney, notarized by the same notary, and part of the same series of purchases, the words "at coal depth" were not interlined. But other interlineations were used in lieu thereof, e.g. "except oil and gas" and variations having the same meaning. There was an obvious pattern of having one or another of those interlineations, but not both. Unless the words "at coal depth" were intended to denote the same limitation as "except oil and gas," they would serve no purpose. There would be no logical purpose in specifically limiting mining ways and rooms to coal depth: that is the only place mining ways and rooms would be under any circumstances. If there was any good reason related only to coal for inserting those interlined words "at coal depth," that reason would have been equally good for all deeds.

The only way the deeds can include oil and gas is to conclude that the parties intended the words "other mineral" to include oil and gas. The deeds speak of the "right to mine and remove said coal and other mineral and the right to conduct mining operations under the surface of said tracts of land therefor," and of "mining ways to and from beds of coal or other mineral in other lands." One does not "mine" oil and gas, or "conduct mining operations under the surface" for oil and gas. One never speaks of "beds" of oil and gas. The words "other mineral" appear specifically three times, and a fourth time as "therefor." It would be unreasonable to argue that one reference to "other mineral" includes oil and gas, but other references in the same deed do not. The test is the intention of the parties. It is nothing short of ridiculous to argue that the parties intended to include oil and gas.

Donk, et al. introduced no evidence whatever bearing on the intention of the parties. They introduced other deeds and leases and rested their case. On the other hand, Kline, et al. introduced a great amount of direct evidence.

William Ganzer, the aged agent of the coal interests and solicitor of the coal rights from the farmers testified. His testimony was uncontradicted that only coal rights were purchased and intended to be purchased. He actually went to the home of the grantor and purchased the options.

Mr. Ganzer testified that subsequent to the conveyances he had a conversation with Rassieur, since deceased. Objection to the testimony was sustained. An offer of proof was made that, if permitted to testify, he would say that he had made a special trip to St. Louis to ask Rassieur what he intended by the words "other mineral" in the deeds; that Rassieur replied to the effect that coal and other mineral necessarily mined with coal, and not oil and gas, were intended and purchased, and that he, Rassieur, would so testify if requested. The brief of Kline et al. clearly shows that the objection should have been overruled and the testimony admitted.

The printed form of "Notice of Acceptance of Coal Rights Under Option" used in all cases prior to execution of the deed was introduced in evidence. It does not speak of either oil and gas or other mineral.

The records of the coal company were subpoenaed into court. This included many letters and documents over the signature of Theodore Rassieur, the grantee attorney for the coal company. They specifically referred to the land in question, and all of the properties in the field. All showed conclusively that only coal rights were bought or intended

to be bought. There was not even a suggestion that oil and gas were included or intended to be included.

The words "other mineral" as used in this Warranty Deed to Coal and Mining Rights, and under the circumstances, are ambiguous. The adoption of arbitrary definitions in reference to mineral substance buried in the earth is not permissible. The word "mineral" standing by itself, might, under a broad, general, popular definition, embrace the soil and all that is to be found beneath its surface; under a strict definition coupling it with mines, it covers all substances taken out of the bowels of the earth by the process of mining. With reference to the scientific definition of minerals and the popular understanding of what constitutes minerals, it is necessary, if possible, in construing grants, to ascertain the intention of the parties. It is necessary that each case be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor if it can be ascertained. The word "minerals" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a give case. The most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor, if it can be ascertained. This is the "reasonable rule, and it is supported by an abundance of authority."

The primary purpose of construction of a deed is to ascertain the intention of the parties, to be determined and gathered from the instrument as a whole, giving effect to every word and rejecting none as meaningless or repugnant, if this can be done without violating some positive rule of law. The words need not be construed literally or

strictly, since greater regard is accorded to the real intention as manifested in the entire deed than to any particular word or arrangement in its expression. *Kinder* v. *LaSalle County Coal Co.* (1923), 310 Ill. 126, 132, 141 N.E. 537; *Miller* v. *Ridgley* (1954), 2 Ill. 2d 223, 117 N.E. 2d 759, 760; *Texas Co.* v. *O'Meara* (1941), 377 Ill. 144, 36 N.E. 2d 256; *Magnolia Petroleum Co.* v. *West* (1940), 374 Ill. 516, 30 N.E. 2d 24, 26; *Bear* v. *Millikin Trust Co.* (1929), 336 Ill. 366, 381, 168 N.E. 349; *Nance* v. *Donk* (1958), 13 Ill. 2d 399, 151 N.E. 2d 97 (Opinion of the Court); Hardin, Transfer of Mineral and Royalty Interest, Grant or Reservation of Coal and Other Minerals (1959), No. 2 U. of Ill. Law Forum 507, 518.

The word "mine" is indicative of the intention that the right to drill was not reserved. It is a matter of common knowledge that coal can be removed from the ground by lateral mining operations which will not disturb the surface. Coal operators mine tracts consisting of hundreds of acres of coal by means of underground galleries and in many instances the coal is sold independent of the surface, which allows such operators to mine it. *Rhomberg* v. *Texas Co.* (1942), 379 Ill. 430, 40 N.E. 2d 526, 529.

This is also the law in Indiana and Ohio. *Monon Coal Co.* v. *Riggs* (1944), 56 N.E. 2d 672, 57 N.E. 2d 598; *Jividen* v. *New Pittsburg Oil Co.* (1933), 45 Ohio App. 294, 187 N.E. 124.

The Pennsylvania courts, probably the most experienced in oil and gas law, go further and hold that "there is a rebuttable presumption that the word mineral when used in a deed, reservation or exception does not include oil or natural gas." *Dunham* v. *Kirkpatrick* (1882), 101 Pa. 36, 47 Am. Rep. 696; *Silver* v. *Bush* (1906), 213 Pa. 195,

62 A. 832; *Preston* v. *South Penn. Oil Co.* (1913), 238 Pa. 301, 86 A. 203; *Bundy* v. *Myers* (1953), 372 Pa. 583, 94 A. 2d 724.

Where words of inheritance are not used, the rule is that every word used in the conveyance, irrespective of where it may be found, shall be given weight in construing the instrument. Although defendants seek to caption the quoted statement an habendum clause, it is in reality, a part of the granting clause. The habendum clause is the "to have and to hold" clause. There is none in this deed. The old decisions making a distinction based on the location in a deed of particular wording are no longer followed by the Supreme Court of Illinois. In construing a deed all of its parts should be considered and harmonized, if possible. Since it cannot be presumed that words or terms in a conveyance were employed without a meaning, or having some effect accorded them, a construction will be adopted, if legally permissible, giving effect not only to the instrument as a whole, but to each word and term used, rejecting none as meaningless, repugnant or surplusage. The circumstances attending the transaction, the situation of the parties, the objects which they had in mind, as shown by the deed, as well as those they did not have in mind and could not attain, merit consideration in construing deeds. *Smith* v. *Grubb* (1949), 402 Ill. 451, 84 N.E. 2d 421, 425; *Magnolia Petroleum Co.* v. *West* (1940), 374 Ill. 516, 30 N.E. 2d 24, 26; *Bear* v. *Millikin Trust Co.* (1929), 336 Ill. 366, 381, 168 N.E. 349; *Rhomberg* v. *Texas Co.* (1942), 379 Ill. 430, 40 N.E. 2d 526, 529; *Texas Co.* v. *O'Meara* (1941), 377 Ill. 144, 36 N.E. 2d 256; *Kinder* v. *LaSalle County Coal Co.* (1923), 310 Ill. 126, 132, 141 N.E. 537.

Equity may reform a written instrument failing to express agreement made or intended by parties through mutual mistake, either of law or of fact, or mistake of one accompanied by the fraudulent knowledge and procurement of other parties. *Darst* v. *Lang* (1937), 367 Ill. 119, 10 N.E. 2d 659, 661; *McCall* v. *Middleton* (1922), 304 Ill. 408, 412, 136 N.E. 723; *Dill* v. *Widman* (1953), 413 Ill. 448, 109 N.E. 2d 765, 769; *Dazey* v. *Binkley* (1918), 285 Ill. 513, 522, 121 N.E. 165; Hermann, Reformation and Rescission (1960), No. 1, U. of Ill. Law Forum 1.

If there is any inconsistency in the instrument between the printed form and the typewritten words "at coal depth," the typewritten words will be controlling as showing the real intent of the parties. *Haughn* v. *Haughn* (1921), 296 Ill. 305, 308, 129 N.E. 807.

The right to ingress and egress, and the right to use the surface of the land, which may be implied from a specific grant of oil and gas, will not be implied against language in the deed which is inconsistent with, or contrary to, such rights. The Warranty Deeds to Coal and Mining Rights do not convey surface rights for any purpose. The result is that no oil and gas rights were conveyed nor intended to be conveyed. The conveyance was limited to coal and other minerals recovered at coal depth by means of underground passageways from other lands. Ambiguities in the deed should be resolved against the grantee because the grantee drew the deed and approved it as drawn. *Chicago, Wilmington & Franklin Coal Co.* v. *Miner* (1942), 127 F. 2d 1006; *Kigler* v. *LaSalle County Coal Co.* (1923), 310 Ill. 126, 135, 141 N.E. 537.

The District Court's memorandum on the merits and Donk, et al. quote the so-called "concurring opinions" in

Nance v. Donk (1958), 13 Ill. 2d 399, 151 N.E. 2d 97. They ignore the Opinion of the Court and the great many unanimous opinions of the Supreme Court of Illinois. Those "concurring opinions" are more in the nature of dissenting opinions. They were added under the pressure of belated petitions by the Illinois Oil and Gas Association for rehearing, and without further hearing being granted.

It must be noted that the decision was not on the merits but on the sufficiency of the complaint. It was upheld.

The opinion as originally given was unanimous except for the notation at the close that Mr. Justice House dissented. Subsequently, the Illinois Oil and Gas Association, as amicus curiae, intervened with a motion for rehearing. The opinion was modified slightly upon denial of petition for rehearing. The first sentence of the fourth paragraph was stricken, viz., "Before we consider the merits of the complaint, it is necessary to dispose of a matter of form that defendant urges." The second sentence of the next to the last paragraph was modified from "The complaint alleges * * *" to "Count 5 alleges * * *" The last sentence of the same paragraph was changed from "In our opinion these facts, if proved, would entitle the plaintiffs to the relief they seek" to "In our opinion these allegations are sufficient to require an answer." Mr. Justice House withdrew his dissent and the concurring opinions were added. The "concurring opinions" oppose construction but agree that reformation of the Warranty Deed to Coal and Mining Rights is called for. They otherwise appear to be more in the nature of dissenting opinions. Their opposition to construction is difficult, if not impossible, to rationalize in the light of the well settled and clearly stated law of Illinois in prior decisions and in the Opinion of the Court in that case and even in the citations referred to

by those "concurring opinions." They are so obviously in error in so many respects that they are of no value. If they correctly state the law in Illinois, it would be a radical departure from precedent in Illinois, and the weight of authority elsewhere.

Particular attention is called to the relevant wording of the Opinion of the Court. The *Nance* case involved a Warranty Deed to Coal and Mining Rights identical with the present one. The Opinion of the Court recites the allegations of the complaint, viz.

> Theodore Rassieur, the grantee in that deed (and the present one) was a principal shareholder and director of Donk Bros. From 1907 to 1911 and thereafter Rassieur and other agents of the company solicited options for coal rights in two townships in Bond County. The agents represented to the owners in the vicinity that only coal was desired, and the right to remove it by means of underground passageways. The various deeds resulted. In order to make definite the intention of the parties that no surface rights or anything below coal depth were being conveyed, the words "at coal depth" were interlined in the original deeds. The grantors did not intend to sell or the grantees to buy the oil and gas underlying or the right to drill for and recover it. The deeds to the coal rights were prepared by the grantee. The grantors intended to convey and the grantees to acquire, only the coal and such mineral substances as formed a part of, or were found lying with, the coal in place.
>
> In construing deeds we start with the proposition that the purpose of construction is, of course, to arrive at the intention of the parties. To that end all of the words used in the conveyance are to be taken into account, and effect is to be given to the instrument as a whole. Under these circumstances the relevant background facts become important. From what has

> been said it follows that the decree of the Circuit Court of Bond County must be reversed and the cause remanded with direction to overrule the motion to dismiss.

In the face of the Opinion of the Court and the obvious errors of the "concurring opinions, it is beyond comprehension how the District Court in its memorandum on the merits of the present case could hold for Donk, et al. and say that, "the ghosts of the past that have long haunted the courts in the State of Illinois, when they were faced with the term coal and other mineral was laid to rest by the Illinois State Supreme Court in the case of *Nance v. Donk Bros. Coal and Coke Company.*".

Certainly, if ghosts of right and equity were laid to rest, it was in a shallow grave. The Illinois Supreme Court has consistently held that each case must be decided upon the language of the grant, the surrounding circumstances, and the intention of the parties. "The adoption of arbitrary definitions in reference to mineral substances buried in the earth is not permissible * * * The word minerals is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a given case * * * The most reasonable rule is that each case must be decided upon the language of the grant or reservation, the surrounding circumstances, and the intention of the grantor, if it can be ascertained * * *" *Kinder v. LaSalle County Coal Co.* (1923), 310 Ill. 126, 132, 141 N.E. 537. Those statements are repeated over and over in the many decisions cited. If they are the ghosts to be laid to rest, they will, like Banquo's ghost, rise again and again to haunt the rapacious schemes of such as Donk, et al. Right and equity must prevail.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted for the following reasons: The Court of Appeals has 1) decided an important question of local law in a way probably in conflict with applicable local decisions; 2) decided an important question of federal law which has not been, but should be, settled by this Court; 3) decided a federal question in a way probably in conflict with applicable decisions of this Court; and 4) has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision; all as provided by Rule 38, Section 5(b) of the Supreme Court.

Respectfully submitted,

WILLIS P. RYAN,
HARLAN HELLER,
RYAN AND HELLER,
1709 Broadway,
Mattoon, Illinois,

L. C. COMBE,
311 W. Main Street,
Greenville, Illinois,

Attorneys for Counter Defendants Edward W. Kline and Ruth Lyoch, Administrators of the Estate of Walter E. Kline, deceased; R. E. Hayes; W. T. Frederking and A. P. Wagemann.